

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**JANUARY 3, 2012**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Acosta, Abdus-Salaam, JJ.

4235- Index 117902/09  
4235A K2 Investment Group, LLC, et al.,  
Plaintiffs-Respondents-Appellants,

-against-

American Guarantee & Liability  
Insurance Company,  
Defendant-Appellant-Respondent.

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Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of  
counsel), for appellant-respondent.

Michael A. Haskel, Mineola, for respondents-appellants.

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Judgment, Supreme Court, New York County (Ira Gammerman,  
J.H.O.), entered June 23, 2010, in plaintiffs' favor against  
defendant on the causes of action to enforce a default judgment  
and dismissing the causes of action alleging bad faith, affirmed,  
with costs. Appeal from order, same court and J.H.O., entered on  
or about June 14, 2010, unanimously dismissed, without costs, as  
subsumed in the appeal from the judgment.

Plaintiffs are limited liability companies that made  
multiple loans totaling approximately \$3 million to nonparty  
Goldan, LLC of which defendant's insured, Jeffrey Daniels, an

attorney, was a member. In the legal malpractice action underlying this action, it was alleged that as attorney for plaintiffs, Daniels undertook to record mortgages in plaintiffs' favor to secure those loans, and to obtain title insurance, and that he failed to do so, rendering plaintiffs' investments unsecured. Goldan became insolvent and never made any payments on the loans. The legal malpractice action alleged that as a consequence of Daniels's negligent failure to record the mortgages or obtain title insurance, plaintiffs did not have security in the mortgaged properties, and the promissory notes evidencing the loans became uncollectible.

Plaintiffs demanded \$450,000 from Daniels in full settlement of their claims. This amount was well within the \$2 million aggregate and \$2 million per-claim limits of the lawyers professional liability insurance policy issued to Daniels by defendant. However, defendant disclaimed its duty to defend or indemnify based upon two exclusions in the policy. One exclusion was for claims based upon or arising out of the insured's capacity or status as an officer, director, etc., of a business enterprise. The other exclusion was for any claim arising out of the alleged acts or omissions of the insured for any business enterprise in which he had a controlling interest.

After Daniels failed to appear in the malpractice action, a

default judgment was entered against him in the amounts of \$2,404,378.36 in favor of plaintiff K2 and \$688,716.00 in favor of plaintiff ATAS. Daniels then assigned to plaintiffs all his claims against defendant, including bad faith claims.

Having disclaimed its duty to defend its insured in an action that culminated in a default judgment, defendant "cannot challenge the liability or damages determination underlying the judgment" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]). Nor can it raise defenses to plaintiffs' claim against Daniels (*Rucaj v Progressive Ins. Co.*, 19 AD3d 270, 273 [2005]). However, defendant is entitled, in the direct action against it, to raise defenses with respect to its obligations to cover the claims against Daniels, including the applicability of any asserted policy exclusions (*Lang* at 356).

"While the duty to defend is generally measured against the allegations of the pleadings in the underlying action, the duty to indemnify is distinctly different, for it is determined by the actual basis of the insured's liability to plaintiff" (*Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769, 770 [1997]). Contrary to defendant's argument here, the exclusions did not apply with respect to either the duty to defend which was demonstrated based upon the allegations of legal malpractice or the duty to indemnify for a judgment based in legal malpractice.

Thus, defendant cannot at this juncture assert defenses that would have defeated the legal malpractice claims (for example, that Daniels was not performing legal services for plaintiffs but was instead representing Goldan) or would have established the applicability of the exclusions, to the extent that the applicability of the exclusions is inconsistent with the judgment determining Daniels's liability to plaintiffs for legal malpractice (see *Lang*, 3 NY3d at 356; compare *Fisher v Hanover Ins. Co.*, 288 AD2d 806 [2001], and *Fusco v American Colonial Ins. Co.*, 221 AD2d 231 [1995] [where default judgment was entered against insured, insurer's disclaimer based on policy's notice requirements was valid defense to action pursuant to Insurance Law § 3420(b)(1)]).

"To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the burden of demonstrating that the allegations of the complaint in the underlying claim cast the pleadings wholly within that exclusion, that the exclusion is not subject to any other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer might be eventually obligated to indemnify its insured (citations omitted)" (*Utica First Ins. Co. v Star-Brite Painting & Paperhanging*, 36 AD3d 794, 796 [2007]). No material issue of fact exists as to whether the allegations of plaintiffs'

legal malpractice claims are based, even in part, upon Daniel's acts or omissions in his capacity as an officer, director, etc., of a business enterprise or any acts or omissions for a business enterprise in which he had a controlling interest, so as to bring them within either of the exclusions invoked by defendant (*id*). Rather, the allegations of legal malpractice were focused solely on Daniels's negligence as plaintiffs' counsel.

Although plaintiffs allege that Daniels was a member of Goldan, the basis of the legal malpractice action was that Daniels agreed to act as plaintiffs' attorney in the preparation of mortgages and related notes, in arranging for title insurance at Goldan's expense, and in recording the mortgage liens, that he failed to record the mortgages and obtain title insurance, and that his failure was a departure from good and accepted legal practice, and caused injury to plaintiffs. It was not alleged that Daniels was negligent in rendering legal services to his business enterprise, Goldan. The action was based exclusively on his obligation to plaintiffs, not to Goldan. With respect to defendant's duty to indemnify, Daniels's alleged controlling interest in Goldan did not affect his obligations to plaintiffs as their lawyer. His liability to plaintiffs is premised solely on the attorney-client relationship between him and plaintiffs, not on any interest that he had in Goldan.

Thus, the exclusions relied upon by defendant are patently inapplicable. That Daniels was an owner of Goldan or might have been acting in the interests of Goldan instead of those of his clients may explain why Daniels acted as he did, but it does not change the essence of the complaint, or the basis of liability, which is that Daniels committed legal malpractice in his representation of plaintiffs (see *American Guar. & Liab. Ins. Co v Moskowitz*, 58 AD3d 426 [2009] [rejecting similar arguments advanced by defendant]). Daniels committed legal malpractice while he was an owner, officer, etc., of Goldan. However, the policy does not exclude coverage for *all conduct* occurring while he was an owner or officer but only for *claims* arising out of his capacity as such (see *RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 165 [2004]).

The dissent concludes that there is an issue of fact as to the actual basis of Daniels's liability to plaintiff, and thus as to the applicability of the exclusions, pointing to issues that can be raised by defendant outside the allegations of the complaint and the default judgment of legal malpractice, such as whether Daniels also represented Goldan. This interpretation of the policy exclusions is overly broad, as the exclusions are more reasonably understood to be "designed to exclude claims based upon legal work performed by an insured for an enterprise in

which he or she has some kind of ownership interest and thus where the insured is likely to benefit directly from recovery under the policy" (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 70 [1998]; see also *Niagara Fire Ins. Co. v Pepicelli, Pepicelli, Watts and Youngs, P.C.*, 821 F2d 216, 220 [3d Cir 1987] ["The exclusions speak of excluded claims, and thus the character of the specific legal claims, rather than the malpractice suit's general factual background, must be analyzed to determine the exclusion issue. The claims made by (the legal malpractice claimant) deal only with negligence and breach of contract in the Law Firm's representation of the (legal malpractice claimant), and resolution of the claims will affect only the interests of (the legal malpractice claimant) and the Law Firm . . . Therefore, the legal malpractice claims are not omitted from coverage by the two exclusions . . . *designed to exclude business risk and collusive suits from coverage under the policy*"] [emphasis added]).<sup>1</sup> Because neither Daniels's actions in furtherance of Goldan's business nor his financial interest in

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<sup>1</sup> While the dissent notes that the *Niagara* analysis applied Pennsylvania law, the discussion of the purpose and applicability of these types of exclusions is apt and has general relevance. The dissent does not suggest that New York law is different in this regard. We disagree with the dissent's assessment that the exclusions in *Niagara* (for any claim arising out of any insured's activities as an officer, etc., of a company) are not as broad as the exclusions here.

Goldan are part of the legal malpractice claim made by plaintiffs for malpractice committed by Daniels, the legal malpractice claim is not excluded from coverage.

Contrary to the dissent's conclusion, the analysis in *Oot* (244 AD2d at 70) is applicable to this case. *Oot* points out that these types of exclusions are designed to apply to legal work performed by the insured for *his* enterprise. The allegations of the legal malpractice claim here simply do not include a claim that Daniels performed legal work for Goldan. The dissent's focus on the *discontinued* causes of action on the guarantees obscures the relevant analysis, which is whether the judgment, based solely on legal malpractice, was a judgment based on legal work performed for Goldan. Clearly, it was not.

This situation is to be contrasted with that in *American Guar. & Liab. Ins. Co. v Hoffman* (61 AD3d 410 [2009]), relied upon by defendant, where the policy at issue excluded from coverage any claims based "in whole or in part" on acts "in connection with" a trust, and "each claim in the underlying proceeding centered on the transfer of stock held by a trust for the petitioners therein to a trust created by defendants of which they were the sole trustees and beneficiaries" (*id.* at 410 [internal quotation marks omitted]).

Finally, plaintiffs failed to establish a *prima facie* case

of bad faith based upon defendant's "gross disregard" of the insured's interests under the policy (see *Pavia v State Farm Mut. Auto. Ins. Co.* (82 NY2d 445, 453 [1993])), given Daniels's representation to defendant that, notwithstanding the allegations of the complaint concerning his legal representation of plaintiffs, his law firm rendered services to Goldan, and the overall questionable circumstances of the underlying transactions.

All concur except Tom and Andrias, JJ. who dissent in part in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting in part)

I agree with the majority that plaintiffs failed to establish a prima facie case of bad faith based upon defendant's alleged gross disregard of its insured's interests. However, I disagree with the majority's position that the policy exclusions relied on by defendant are "patently" inapplicable. Therefore, I dissent from the majority's affirmance of the judgment in plaintiffs' favor on the causes of action to enforce the default judgment in the underlying action, and would deny all parties summary judgment as to those claims.

Plaintiffs loaned \$2,830,000 to Goldan, LLC, a real estate company owned by Jeffrey Daniels and Mark Goldman. Plaintiffs claim that Daniels, an attorney, agreed to represent them in the transactions and that he failed to record mortgages securing the loans or obtain title insurance.

Daniels had a lawyers professional liability policy with defendant American Guarantee and Liability Insurance Co. (American) that extended indemnity coverage, subject to the policy terms, for amounts Daniels became legally obligated to pay as damages because of a claim based on an act or omission in his rendering or failing to render legal services for others. The relevant policy exclusions provide:

"This policy shall not apply to any Claim based upon or

arising out of, in whole or in part:

. . .

"D. the **Insured's** capacity or status as:

"1. an officer, director, partner, . . . shareholder, manager or employee of a business enterprise . . . [Insured's Status Exclusion].

"E. the alleged acts or omissions by any **Insured**, with or without compensation, for any business enterprise, whether for profit or not-for profit, in which any **Insured** has a **Controlling Interest** [Business Enterprise Exclusion]."

On December 2, 2008, Daniels placed American on notice of plaintiffs' potential claim, stating:

"I have become aware of circumstances that would lead me to believe that a claim may be asserted against my law firm as a result of legal services that I have rendered to a real estate development company, Goldan, LLC. Goldan is [a] company that is owned by myself and an individual named Mark Goldman. My law firm provided legal services to Goldan on a retainer basis.

"[Claimants] have indicated that they believed I was representing their interests in ensuring that the funds in excess of several million dollars that were lent to Goldan over several transactions were secured by filed mortgages against real property. I do not have personal knowledge of these mortgages which, I believe, were negotiated directly with Mark Goldman. However, it appears that these mortgages may not have been recorded."

On or about December 31, 2008, American reserved its rights to deny coverage on various grounds, including the Insured's Status Exclusion and Business Enterprise Exclusion. On or about January 16, 2009, plaintiffs sued Daniels, Goldman and Goldan.

In the first and second causes of action, plaintiffs asserted that Daniels's failure to record the mortgages or obtain title insurance was a departure from good and accepted legal practice and deprived plaintiffs of a secured interest in the properties. In the fifth and sixth cause of actions, they alleged that Daniels breached his personal guarantees of the loans.

American allegedly retained counsel to represent Daniels, who received extensions of time to answer. By letter dated March 9, 2009, American informed Daniels that it was ceasing to pay for his defense and was disclaiming coverage on various grounds, including that the action fell outside the policy insuring clause because it was based on self dealing; was excluded from coverage under the Insured's Status Exclusion and Business Enterprise Exclusion; and sought restitution of loan principal and interest owed by Goldan and Daniels (as guarantor), not "damages" as defined by the policy. American also reserved its rights under other policy provisions, as well as generally.

On June 8, 2009, plaintiffs wrote to Daniels demanding \$450,000 "in full resolution of the claims asserted in [the underlying] action." Daniels forwarded the letter to American, which, by letter dated July 8, 2009, reiterated its disclaimer and rejected the settlement offer.

On October 2, 2009, a default judgment was entered against

Daniels that held him liable to plaintiff K2 for \$2,404,378.36 and plaintiff ATAS for \$688,716. Upon plaintiffs' application, the personal guarantee claims were discontinued without prejudice. American states that it was not notified of the application for the default judgment or of the discontinuance.

On or about December 14, 2009, Daniels assigned his claims against American to plaintiffs, which commenced this action. In the first and second causes of action, plaintiffs seek to recover the amount of the default judgment, up to the policy limits. In the third and fourth causes of action, plaintiffs assert that American breached the implied covenant of good faith and fair dealing, and seek to recover the full amount of the judgment.<sup>1</sup>

Pursuant to Insurance Law § 3420(b), an injured party can recover against the carrier to the same extent that the insured would be entitled to recover under the terms of the policy. A default judgment entered against an insured in an underlying suit is binding on the carrier, which cannot contest the merits of the plaintiff's claim in a subsequent suit under § 3420 (see *Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769, 771 [1997]);

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<sup>1</sup>The complaint alleges that on or about February 18, 2009, an involuntary petition for relief was filed under Chapter 7 of the United States Bankruptcy Code, 11 USC §§ 101 *et seq*, naming Goldan as debtor, and that on or about April 3, 2009, a default judgment was entered in the underlying action against Goldman in the amount of \$2,945,474.35.

*Matychak v Security Mut. Ins. Co.*, 181 AD2d 957 [1992], *lv denied* 80 NY2d 758 [1992]). However, the carrier may contest the scope of coverage under the policy and is entitled to raise defenses with respect to the applicability of the insuring and exclusionary provisions (see *Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]; *Fisher v Hanover Ins. Co.*, 288 AD2d 806 [2001]); *Fusco v American Colonial Ins. Co.*, 221 AD2d 231 [1995]; see also *Cirgone v Tower Ins. Co. of N.Y.*, 76 AD3d 883, 884 [2010], *lv denied* 16 NY3d 708 [2011] ["As Navana's assignees, plaintiffs are now suing upon a claim which is subject to the same defenses Tower could have asserted against Navana"]).

In contrast to the duty to defend, the duty to pay is determined "by the actual basis for the insured's liability to a third person" (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). "[T]he breach by [a] defendant of its duty to defend does not create coverage, and [a] defendant is not precluded from demonstrating that the actual basis of the insured's liability to plaintiff[s] is such that the loss falls entirely within the policy exclusion'" (*Matijiw v New York Cent. Mut. Fire Ins. Co.*, 292 AD2d 865, 865 [2002], quoting *Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769, 771 [1997], *supra*). Thus, even if American were found to have breached a duty to defend, it would not be required to indemnify

Daniels, and in turn plaintiffs, for a judgment for a loss that is excluded by the policy.

Although the default judgment in the underlying action established Daniels's liability to plaintiffs, it did not establish American's. American's liability to plaintiff, as an indemnitor, depends on facts outside of the default judgment (see *Holmes v Allstate Ins. Co.*, 33 AD2d 96, 97-98 [1969]). Even if the default judgment mandates a finding that Daniels is liable to plaintiffs, it does not foreclose a finding that Daniels represented both Goldan and plaintiffs in connection with the mortgage transactions and that his conduct falls within the ambit of either the Insured's Status Exclusion or the Business Enterprise Exclusion, or both, because his failure to record the mortgages and obtain title insurance was a business decision to benefit his company, Goldan.

The majority finds that the Insured's Status Exclusion and Business Enterprise Exclusion do not apply because plaintiff's underlying malpractice claims were "based on" Daniels's status as plaintiffs' attorney, and not, even in part, on his performance of services for, or his status as an owner of, Goldan. This interpretation of the exclusions is too narrow.

The policy language is broad, expressly stating that the policy "shall not apply to any Claim based upon *or arising out*

*of, in whole or in part* etc." (emphasis added) the insured's capacity or status as an officer or director of a business enterprise or from the alleged acts or omissions of the insured for any business enterprise in which he has a controlling interest. While plaintiffs allege in the underlying complaint that Daniels represented them, in his notice of the potential claim, Daniels advised American that to the extent he rendered legal services at all, those services were rendered to his own company, Goldan. Further, the complaint states that Daniels was a principal of Goldan, and American contends that Daniels engaged in self-dealing by representing one, if not both, of the parties to the loan transaction and also acting as the principal of the business enterprise receiving the loans. Thus, even if plaintiffs' allegations of malpractice triggered the policy's insuring clause, an issue of material fact remains as to whether plaintiffs' legal malpractice claims, at least in part, are based upon or arose out of Daniels's capacity or status as an officer, director, shareholder or employee of Goldan, or out of his alleged acts or omissions on behalf of Goldan, a business enterprise in which he had a controlling interest (*see Denihan Ownership Co., LLC v Commerce & Indus. Ins. Co.*, 37 AD3d 314, 315 [2007] ["Words like 'arising from,' when used in exclusion clauses, are generally taken as a broad and comprehensive

reference to events originating from, incident to, or having connection with the subject of the exclusion" ] ).

The majority contends that this interpretation of the policy exclusions is overbroad, "as the exclusions are more reasonably understood to be 'designed to exclude claims based upon legal work performed by an insured for an enterprise in which he or she has some kind of ownership interest and thus where the insured is likely to benefit directly from recovery under the policy' (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 70 [1998])." However, *Oot* is distinguishable on its facts.

In *Oot*, Olde Mill sued Earl Oot, Thomas Oot, and the Oot Law Offices, alleging that Earl had performed legal services for it with respect to the refinancing of a note and mortgage held by Earl and others as mortgagees, without disclosing his conflict of interest and in breach of his fiduciary duty. The Fourth Department held that coverage for the underlying claims against Thomas was not excluded by a policy provision excluding claims based on work with respect to any business venture in which the insured had a pecuniary or beneficial interest. However, in so ruling, the court, noting that the carrier had made "that argument despite its failure to cross-appeal from that part of the judgment in favor of Earl, which implicitly finds that the claim was covered under the policy" (244 AD2d at 69-70), found

the clause inapplicable because "[t]he underlying action arises out of work performed by Earl for Olde Mill; Thomas did not participate, and his liability arises solely by virtue of his partnership with Earl" (*id.* at 70). The court further held that "the exclusion applies only to a 'pecuniary or beneficial' interest that the insured 'has' at the time the claim is made for which the insured seeks coverage" and that "[b]ecause Earl was no longer a mortgagee at the time the claim was made, no such benefit exists" (*id.*).

Here, in contrast, plaintiffs allege that it was Daniels who committed the malpractice, which arises out of loan transactions between plaintiffs and Goldan, an entity in which Daniels held a pecuniary interest at the time of the claim and whose obligations he personally guaranteed. Further, Daniels advised American that he represented Goldan, and he will receive a direct benefit if American pays the judgment because that will relieve him of personal liability under his guarantees of Goldan's obligations, a claim that was included in the underlying action but discontinued without prejudice.

Nor does *Niagara Fire Ins. Co. v Pepicelli, Pepicelli, Watts and Youngs, P.C.* (821 F2d 216 [3d Cir 1987]), cited by the majority, mandate a different result. In *Niagara*, the exclusions at issue were not as broad as those at issue in this case, which

apply to claims "based upon or arising out of, in whole or in part," the insured's capacity or status as an officer, director, partner, etc., or his acts or omissions for a business enterprise he controls. Further, in *Niagra* the alleged malpractice did not simultaneously involve business decisions by Pepicelli, whereas here a question exists as to whether Daniels's failure to record the mortgage was, in whole or in part, a business decision to benefit his company, Goldan (see *Darwin Nat'l Assur. Co. v Hellyer*, 2011 WL 2259801, 2011 US Dist Lexis 60592 [ND Ill [2011])).

In *Darwin*, the claimants sold land to Harmony Stone LLC for \$1.9 million, secured by a \$1,362,500 mortgage, which Harmony's principals, attorney Hellyer and his partner, guaranteed. Harmony also obtained a \$600,000 mortgage from American Community Bank & Trust (Community). Subsequently, Hellyer entered into an agreement with Community to increase Harmony's loan from \$600,000 to \$1,225,000. As a condition thereof, Community required Harmony to obtain a subordination of mortgage agreement from the claimants. The claimants later sued Hellyer alleging that he acted as their counsel with respect to the loan subordination and committed professional negligence by failing to properly advise them. The claimants also sought to recover the full amount owed on their loan from Harmony or from Hellyer and his partner on

their personal guaranty. In holding that the Business Enterprise Exclusion applied, the court explained that:

"[I]t is reasonable to conclude that these allegations of failing to properly advise his clients are, at a minimum, either indirectly resulting from or in consequence of Hellyer's business interest in Harmony Stone. As another court recently explained, business enterprise exclusions are frequently included in policies because '[i]nsurers calculate liability insurance rates on the assumption that insured attorneys act solely in a legal capacity, and that their professional judgment is unaffected by personal interests. Business enterprise exclusions diminish risk associated with an insured's decision to pursue business opportunities that may result in conflicts between the lawyers' best interests and those of his client.' *Minn. Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP*, No. 1:08-CV-1020, 2010 WL 4853300, at \*10 (E.D. Va. Nov. 18, 2010) (citation omitted). Here, the claim of malpractice is based on the fact that Hellyer had a personal financial stake in his business venture, and this is precisely the increased risk that plaintiff has excluded from its coverage with the Business Enterprise Exclusion" (2011 WL 225980 at \*5, 2011 US Dist LEXIS 60592 at \*15-16).

This view is consistent with New York law recognizing that "[a]n errors and omissions policy is intended to insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession or business," and is not so comprehensive as "to protect against all business vicissitudes" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 700 [1980]). "To hold otherwise, on a fair reading of

the policies, would be to create additional coverage beyond that which was bought and paid for" (*id.*; see also *Societe Generale v Certain Underwriters at Lloyd's, London*, 1 AD3d 164 [2003]; *Tartaglia v Home Ins. Co.*, 240 AD2d 396 [1997]).

In this regard, the duty of good faith and fair dealing implied in every contract is an integral part of an insurance contract (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 452 [1993]), and New York's public policy prohibits indemnification for intentionally caused injuries (see *Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 399 [1981]). American should be allowed discovery to determine if Daniels intentionally failed to record the mortgages. To hold otherwise and allow the insured to shift liability to the insurer would allow the wrongdoer to evade responsibility for his actions.

Accordingly, as issues of fact exist as to whether the Insured's Status Exclusion or the Business Enterprise Exclusion applies, plaintiffs should not have been granted summary judgment

on their first and second causes of actions seeking to enforce the default judgment in the underlying action, and that portion of the judgment should be vacated.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6441- In re Andre B., and Another,  
6441A  
M-3631 Dependent Children Under the  
Age of Eighteen Years, etc.,

Wilner G. B.,  
Respondent-Appellant,

New York City Administration  
for Children's Services,  
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of  
counsel), for appellant.

Steven N. Feinman, White Plains, attorney for the children.

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Orders of disposition, Family Court, Bronx County (Ilana  
Gruebel, J.), entered on or about September 20, 2010, which, upon  
a fact-finding that respondent father neglected the child  
Giovanni D. and derivatively neglected the child Andre B., placed  
Giovanni in the custody and guardianship of the Commissioner of  
Social Services until the next scheduled permanency hearing and  
placed Andre in the custody of his mother, unanimously affirmed,  
without costs.

The findings of neglect and derivative neglect are supported  
by a preponderance of the evidence showing that respondent posed  
an imminent danger of harm to Giovanni (*see Nicholson v*  
*Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Joshua R.*, 47 AD3d

465 [2008], *lv denied* 11 NY3d 703 [2008]). A hospital clerk testified that she saw respondent forcefully shake the two-week-old Giovanni like a rag doll, that respondent told her he had been feeding the infant bananas, and that respondent called the baby the devil. Giovanni's mother also testified that respondent fed the infant bananas and referred to him as a "devil child." Petitioner was not required to demonstrate actual harm to the infant (*see Matter of Pedro C. [Josephine B.]*, 1 AD3d 267 [2003]). Respondent's conduct reflects so flawed an understanding of the duty to protect one's children from harm as to present a substantial risk of harm for any child in his care (*see Joshua R.*, 47 AD3d at 466).

**M-3631 - *In re Andre B. and Another***

Motion to be relieved as counsel denied.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6442           Satellite Asset Management, L.P.,           Index 116699/10  
                  Plaintiff-Respondent,

-against-

Fifth Avenue Building Company, LLC,  
Defendant-Appellant.

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Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel),  
for appellant.

Newman Ferrara LLP, New York (Jarred I. Kassenoff of counsel),  
for respondent.

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Order and judgment (one paper), Supreme Court, New York  
County (Charles E. Ramos, J.), entered July 22, 2011, which,  
among other things, granted plaintiff tenant's motion for partial  
summary judgment on its first cause of action, for declaratory  
relief, to the extent of declaring that plaintiff has no  
obligation to restore the premises, and directed defendant  
landlord to return plaintiff's security deposit, unanimously  
affirmed, with costs.

Article 10.07 of the lease at issue provides, in pertinent  
part: "All appurtenances, fixtures, improvements, additions and  
other property attached to or installed in the Premises, whether  
by Landlord or Tenant or others, and whether at Landlord's  
expense, or Tenant's expense, or the joint expense of Landlord  
and Tenant, shall, unless Landlord elects otherwise, become and

remain the property of Landlord . . . Landlord shall have the right to make its election as to such appurtenances, fixtures, improvements, additions and/or other property at the time it consents to the making or installation thereof, in which case such items shall remain upon, and be surrendered with, the Premises at the end of the Term . . . ”

Reading article 10.07 as a whole, and giving effect to each term (see *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-987 [2009]), it clearly provides that plaintiff must remove only those improvements that the landlord specifically elected be removed at the time it consented to their installation. Further, the provision confers only one election right upon the landlord – namely, the right to elect the removal of improvements. Except for one disputed staircase, neither defendant nor its predecessor elected removal of any of the improvements at issue at the time of consent to their installation. Accordingly, pursuant to article 10.07, the improvements are defendant’s property and should “remain upon, and be surrendered with, the Premises at the end of the Term.”

Although the disputed staircase was the only “‘specialty’ alteration” under article 10.07 of the lease for which removal was elected, the record shows that, among other things, defendant delayed approving plaintiff’s plans for its removal for months.

Accordingly, defendant forfeited any right to insist upon its removal (see *Chemical Bank v Stahl*, 272 AD2d 1, 6 [2000]). Contrary to defendant's contention, the motion court was empowered to determine defendant's entitlement to the staircase's removal, even though that relief was not specifically sought (see CPLR 3001).

Defendant drew down upon plaintiff's letter of credit without authorization under the lease and caused the drawn funds to be deposited into its account, which commingling was only cured after issuance of a court order. As a result, defendant cannot take shelter under article 10.07's carve-out for retention of deposit funds "reasonably necessary in order to secure [plaintiff's] payment obligations" under the lease.

We have considered defendant's remaining contentions, including that summary judgment was premature, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6443 Rosa Victoria Pichardo-Garcia, Index 100957/07  
Plaintiff-Respondent,

-against-

Josephine's Spa Corp.,  
Defendant-Appellant.

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Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Andrew N. Adler of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on or about September 14, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to vacate an order of dismissal, and restored the action to the court calendar, unanimously reversed, on the law and the facts, without costs, and the motion denied. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

In the absence of a determination by the motion court, pursuant to CPLR 5015(a)(1), of the reasonableness of plaintiff's proffered excuse for her failure to appear at a scheduled compliance conference, we reject the claim of law office failure as "conclusory and perfunctory" (see *Perez v New York City Hous. Auth.*, 47 AD3d 505, 505 [2008]). Counsel explained that the

failure to appear was due to a conflict between scheduled appearances in this action and in an unrelated action. However, he did not state that he took any steps to resolve or alleviate the conflict or that he was unaware of the conflict. Counsel's "overbooking of cases and inability to keep track of his appearances" does not constitute a reasonable excuse for the failure to appear (*id.*; see also *Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [2010], *lv dismissed* 15 NY3d 863 [2010]). Moreover, plaintiff made no attempt to vacate the default until almost a year after being served with the notice of its entry (see *Youni*, 70 AD3d at 455).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6444 Donna Spagnoli-Scheman, et al., Index 6077/05  
Plaintiffs-Appellants,

-against-

Thomas G. Bellew, et al.,  
Defendants-Respondents.

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Scarcella Law Offices, White Plains (M. Sean Duffy of counsel),  
for appellants.

Martin, Fallon & Mulle, Huntington (Michael P. Ross of counsel),  
for respondents.

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Judgment, Supreme Court, Bronx County (Patricia Anne  
Williams, J.), entered March 2, 2010, after a jury trial in an  
action alleging serious injuries sustained in a motor vehicle  
accident, dismissing the complaint, unanimously affirmed, without  
costs.

The jury's verdict was based upon a fair interpretation of  
the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9  
AD3d 195, 205-206 [2004]). There was conflicting expert  
testimony regarding whether plaintiff Spagnoli-Scheman sustained  
serious injuries within the meaning of Insurance Law § 5102(d),  
and the jury was "entitled to accept or reject" the testimony of

plaintiffs' experts "in whole or in part" (*Crooms v Sauer Bros., Inc.*, 48 AD3d 380, 382 [2008]; see *Crespo v Chan*, 54 AD3d 621 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6445-

6446-

6447 In re Keoni Daquan A., and Others,

Dependent Children Under the  
Age of Eighteen Years, etc.,

Brandon W.,  
Respondent-Appellant,

April A.,  
Respondent,

New York City Administration  
for Children's Services,  
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman  
Corenthal of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D.  
Scherz of counsel), attorney for the child Keoni Daquan A.

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Orders of disposition, Family Court, New York County (Susan  
K. Knipps, J.), entered on or about August 17, 2010 and October  
18, 2010, which, to the extent appealed from as limited by the  
briefs, bring up for review a fact-finding determination that  
respondent father neglected the subject children, unanimously  
affirmed, without costs.

A preponderance of the evidence supports the finding that  
respondent neglected the children by misusing drugs and not

participating in any rehabilitation program during the relevant period (see Family Ct Act § 1012[f][i][B]; *Matter of Jasmine B.*, 66 AD3d 420 [2009]). Respondent's testimony that he regularly smokes marijuana is prima facie evidence of neglect pursuant to Family Ct Act § 1046(a)(iii). Respondent failed to rebut the statutory presumption of neglect with proof that he "is voluntarily and regularly participating in a recognized rehabilitative program" (*id.*; see *Matter of Stefanel Tyesha C.*, 157 AD2d 322, 326-327 [1990], *appeal dismissed* 76 NY2d 1006 [1990]). Although he testified at a section 1028 hearing that he was in a drug treatment program, he did not identify the program and failed to substantiate his assertion with documentation or other evidence. Under the circumstances, petitioner agency was not required to establish the children's impairment or risk of impairment (see Family Ct Act § 1012[f][i][B]; *Matter of Nasiim W.*, \_\_\_ AD3d \_\_\_, 2011 NY Slip Op 06934, \*1 [2011]; *Stefanel Tyesha C.*, 157 AD2d at 328 [1990]).

The record supports the finding that respondent is a "person legally responsible" for his nonbiological children's care; thus, the finding of neglect with respect to these children is sustainable (Family Ct Act § 1012[a],[g]; *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *Matter of Devina S.*, 24 AD3d 188, 189 [2005], *lv denied* 6 NY3d 715 [2006]). The record shows that

respondent was the long-term boyfriend of the children's mother, the biological father of the mother's other children, and a regular visitor in the mother's home. Moreover, respondent testified that he, at times, watched the children, assisted with their homework and attended their doctors' appointments. Accordingly, the record permits "an inference of substantial familiarity" between the children and respondent (*Matter of Christopher W.*, 299 AD2d 268 [2002]). There is no basis for disturbing the court's credibility determinations (see *Matter of Ilene M.*, 19 AD3d 106, 106 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6449 Michael Cohen, Index 111512/08  
Plaintiff-Respondent, 590130/09

-against-

New York City Industrial  
Development Agency, et al.,  
Defendants-Appellants.

- - - - -

J.H. Mack, LLC,  
Third-Party Plaintiff-Appellant,

-against-

Pre-Fab Construction, Inc.,  
Third-Party Defendant-Respondent.

- - - - -

J.H. Mack, LLC, et al.,  
Second Third-Party Plaintiffs-Appellants,

-against-

Giaquinto Masonry, Inc.,  
Second Third-Party Defendant-Respondent.

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Law Office of Charles J. Siegel, New York (Jack L. Cohen of  
counsel), for appellants.

Torino & Bernstein, Mineola (Vincent J. Battista of counsel), for  
Pre-Fab Construction, Inc., respondent.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of  
counsel), for Giaquinto Masonry, Inc., respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman,  
J.), entered February 2, 2011, which, to the extent appealed from  
as limited by the briefs, granted the motion of third-party  
defendant Pre-Fab Construction, Inc. (Pre-Fab) for summary

judgment dismissing the third-party complaint and granted the cross motion of second-third party defendant Giaquinto Masonry, Inc. (Giaquinto) for summary judgment dismissing the second third-party complaint, unanimously affirmed, without costs.

Plaintiff, an ironworker employed by Pre-Fab, alleges that as he and a coworker were moving steel beams, he slipped and fell on plastic debris located on a sand surface. The construction project, which was to build an indoor tennis facility, was owned by defendants New York City Industrial Development Agency and USTA National Tennis Center Association, Incorporated. The owners had contracted with J.H. Mack, LLC to be the general contractor, and J.H. Mack had contracted with Pre-Fab to perform the steel erection work at the site and with Giaquinto to perform the masonry work.

Dismissal of J.H. Mack's claim for contractual indemnification against Pre-Fab was warranted since there is no evidence that Pre-Fab negligently supervised plaintiff's work or otherwise caused or contributed to the accident (*see Paltie v Marquise Constr. Corp.*, 49 AD3d 380 [2008]; *see also Pepe v Center for Jewish History, Inc.*, 59 AD3d 277 [2009]).

Moreover, plaintiff's testimony as to the source of the plastic debris on which he allegedly slipped was speculative and insufficient to raise a question as to whether Giaquinto caused

or contributed to plaintiff's injuries (see *Grullon v City of New York*, 297 AD2d 261, 263-264 [2002]). Accordingly, the contractual and common-law indemnification claims against Giaquinto were also properly dismissed (see *Consolidated Edison Co. of N.Y., Inc. v Vilsmeier Auction Co., Inc.*, 21 AD3d 726 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

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CLERK



years since his release, defendant's only conflicts with the law were alcohol-related misdemeanors and violations, committed between 1988 and 1992. Defendant addressed his drinking problem by participating in Alcoholics Anonymous, and he has been sober since 1993. There is no dispute that defendant has had no contact with the criminal justice system for the last 20 years. The unusual circumstances presented indicate a low risk of recidivism.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6451 In re Commissioner of Social  
Services, on behalf of Edith S.,  
Assignor-Respondent,

-against-

Victor C.,  
Respondent-Appellant.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of  
counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I.  
Freedman of counsel), for respondent.

D. Philip Schiff, New York, attorney for the child.

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Order, Family Court, New York County (Jody Adams, J.),  
entered on or about August 6, 2010, which denied respondent's  
request for genetic marker testing and declared him to be the  
father of the subject child, unanimously affirmed, without costs.

Respondent's procedural objection challenging a portion of  
the paternity hearing as having been improperly held before a  
Support Magistrate who lacked authority to determine estoppel  
issues in a contested proceeding, is unavailing. The Support  
Magistrate properly referred the matter to a Family Court Judge  
pursuant to Family Ct Act § 439(b) when the issue of equitable  
estoppel was raised. The transfer was consistent with the rule  
that the "Family Court should consider paternity by estoppel

before it decides whether to test for biological paternity” (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 330 [2006]). The adequacy of the evidence presented before the Support Magistrate on the issue of biological paternity is irrelevant, since that evidence was not relied upon by the Family Court Judge.

The evidence presented at the hearing established that the 13-year-old child considers respondent to be her father, enjoys visiting with him, and has a familial relationship with his relatives, including his mother and other children. It further established that the child calls respondent, “dad,” that he never dissuaded her from doing so, and that respondent’s mother has always held herself out as the child’s grandmother. Furthermore, a social worker who interviewed the child testified that subjecting the adolescent child, who wishes to have a stronger relationship with respondent, to genetic marker testing would be emotionally damaging for her at this age. Under these circumstances, although the relationship between respondent and the child was somewhat limited, the Family Court properly

concluded that the best interests of the child require that respondent be estopped from denying paternity (see *Matter of Smythe v Worley*, 72 AD3d 977 [2010]; *Matter of Glenda G. v Mariano M.*, 62 AD3d 536 [2009], *lv denied*, 13 NY3d 708 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6452 Irma Fuentes, et al., Index 302995/09  
Plaintiffs-Respondents,

-against-

Segundo Sanchez, et al.,  
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Arce Law Office, PLLC, Bronx (Yolanda Castro-Arce of counsel),  
for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.),  
entered April 13, 2011, which, to the extent appealed from,  
denied defendants' motion for summary judgment dismissing the  
complaint alleging that plaintiff sustained serious injuries  
under Insurance Law § 5102(d), unanimously affirmed, without  
costs.

On December 16, 2008, then-81-year-old plaintiff Irma  
Fuentes was driving through a intersection when defendants' car  
allegedly ran a red light and struck her. Plaintiffs commenced  
this action, alleging injuries to plaintiff's cervical spine,  
lumbar spine, and left knee under the "permanent consequential  
limitation of use," "significant limitation of use," and 90/180-  
day categories of Insurance Law § 5102(d).

Defendants met their initial burden by submitting the

affirmed reports of their orthopedist and neurologist finding normal ranges of motion in the cervical and lumbosacral spine and the left knee, and concluding that symptoms in those parts of the body had resolved, as well as the MRI reports of their neuroradiologist concluding that the MRI films of the cervical spine, lumbosacral spine, and left knee revealed degenerative changes and no evidence of posttraumatic injuries related to the accident (*see Torres v Triboro Servs., Inc.*, 83 AD3d 563 [2011]). Contrary to plaintiffs' contention, the failure of defendants' experts to review plaintiff's medical records in preparing their reports does not render the reports insufficient, as the experts detailed the specific objective tests they used in their personal examination of plaintiff, which revealed full range of motion, and defendants' radiologist found, upon review of plaintiff's MRI films, no evidence of traumatic injury (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [2011]; *DeJesus v Paulino*, 61 AD3d 605, 607 [2009]).

In response, plaintiffs submitted the affirmations of plaintiff's neurologist and orthopedist, who both found limitations in the range of motion of plaintiff's cervical and lumbar spine shortly after the accident and 1½ year later. Plaintiffs also submitted the MRI reports of plaintiff's radiologist noting disc bulges and herniations in both the

cervical and lumbar spine. This evidence raises triable issues of fact as to whether plaintiff sustained a "significant limitation of use" and "permanent consequential limitation of use" of the cervical and lumbar spine (see *Perl v Meher*, \_\_\_ NY3d \_\_\_, 2011 NY Slip Op 08452 [2011]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Although plaintiffs submitted no evidence quantifying the range of motion limitation in the left knee, the MRI finding of a meniscus tear in the knee, the orthopedist's observations of progressively worsening knee symptoms throughout the course of treatment, plaintiff's eventual need for viscosupplementation injections to the knee, and the orthopedist's conclusion that she would not be able to return to her job as a home attendant, sufficiently raise a triable issue of fact as to a significant and permanent consequential limitation of use of the knee (see *Toure*, 98 NY2d 345).

As to causation, plaintiffs submitted plaintiff's radiologist's reports finding disc bulges and herniations in the cervical and lumbar spine, and joint effusion and a meniscus tear in the left knee, as well as the radiologist's affirmation that the conditions were causally connected to trauma sustained during the accident. Plaintiff's treating physicians also concluded that plaintiff's neck and back injuries were causally related to the accident. Further, plaintiffs adequately addressed

defendants' evidence of degenerative conditions in the neck and back and a pre-existing neck condition resulting from a prior 2003 accident. Plaintiff's neurologist averred in his affirmation that age-related stenosis is usually asymptomatic in the cervical spine, and that, although lumbar stenosis could produce pain, the pain would emerge gradually and not as suddenly and severely as the pain that plaintiff had been experiencing. The neurologist also explained that, given that plaintiff was asymptomatic and working as a home attendant without difficulty for five years following the 2003 accident, her current complaints and measurable limitations "could only be due to the [subject] accident." Additionally, plaintiff's radiologist's finding of joint effusion and a tear in the posterior horn of the medial meniscus, conflicts with defendants' neuroradiologist's finding of a degenerative condition in the posterior horn of the medial meniscus. Because plaintiffs' evidence negates a finding as a matter of law that plaintiff's degenerative and pre-existing conditions were the sole cause of the injuries, plaintiffs raised an issue of fact as to causation (see *Perl*, \_\_ NY3d \_\_, 2011 NY Slip Op 08452; *Jacobs v Rolon*, 76 AD3d 905 [2010]).

Defendants met their initial burden of showing prima facie that plaintiff did not sustain a 90/180-day injury by submitting plaintiffs' bill of particulars stating that she was confined to

bed and home for three days after the accident (see *Hospedales v "John Doe"*, 79 AD3d 536 [2010]). Plaintiffs raised a triable issue of fact by submitting the disability notices issued by plaintiff's treating physicians noting her inability to resume her job duties as of December 24, 2008 until at least May 6, 2009 (see *Escobar v Guzman*, 60 AD3d 421 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6453 Joseph Sweeney, Index 118314/09  
Plaintiff-Respondent,

-against-

New York City Department of Health  
and Mental Hygiene,  
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Casella & Casella, LLP, Staten Island (Ralph P. Casella of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 27, 2010, which denied defendant's motion to dismiss the complaint as barred by the doctrines of collateral estoppel and res judicata, unanimously reversed, on the law, without costs, and the motion granted to the extent of dismissing the action on res judicata grounds. The Clerk is directed to enter judgment dismissing the complaint.

This action is barred by the doctrine of res judicata. Plaintiff's fraud claim, based upon the same harm and arising out of the same facts presented in a prior article 78 proceeding, could and should have been asserted in the prior proceeding (see generally *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-348 [1999]; *Brooklyn Welding Corp. v City of New York*, 198 AD2d

189 [1993], *lv dismissed* 83 NY2d 795 [1994]). Further, the relief sought in this action (i.e., lost civil servant benefits) could have been claimed and awarded in the article 78 proceeding as "incidental to the primary relief sought" (CPLR 7806; see *Pauk v Board of Trustees of City Univ. of N.Y.*, 68 NY2d 702, 704-705 [1986]; *Parker*, 93 NY2d at 348).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

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CLERK



the laws of the State of New York. The record, therefore, establishes that defendant knowingly, intelligently and voluntarily waived his right to appeal. In any event, defendant's sentence was not excessive.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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waived his right to appeal his "conviction," which encompasses his right to challenge his sentence as harsh and excessive (*People v Hidalgo*, 91 NY2d 733, 737 [1998]). Furthermore, defendant executed a written waiver of his right to appeal (*People v Lopez*, 6 NY3d 248 [2006]). The record, therefore, establishes that defendant knowingly, intelligently and voluntarily waived his right to appeal. In any event, defendant's sentence was not excessive.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6457 Danny Velez, Index 106352/08

Plaintiff-Respondent,

-against-

New York City Housing Authority,  
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diana Welch Bando of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 17, 2011, which, in an action for personal injuries allegedly sustained when plaintiff slipped upon a wet condition and fell down the stairs within defendant's building, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law as there are questions regarding whether defendant created the condition upon which plaintiff slipped. Although there was no direct evidence that defendant's custodian mopped the stairs shortly before the accident and the custodian did not recall whether he mopped the stairs on the day of the accident, plaintiff and his uncle testified that the wet substance in the area where plaintiff slipped appeared to be a

cleaning agent, and the custodian was the person solely responsible for mopping the stairs (see *Healy v ARP Cable*, 299 AD2d 152, 154-155 [2002]). Plaintiff's uncle also testified that he saw a blue pail containing, inter alia, mops and cleaning supplies near the subject staircase (see *id.*).

The motion court did not commit reversible error by excluding physical evidence of the cleaning agent allegedly used by defendant to mop the stairs. Such evidence would not have established defendant's entitlement to judgment as a matter of law even if it had supported the custodian's testimony as to its fragrance. That testimony did not contradict the testimony by plaintiff's witnesses regarding the smell of the cleaning agent, and the statement in the custodian's affidavit to the contrary appears to be tailored to avoid the consequences of his deposition testimony (see *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

We have considered defendant's other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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employer without a good faith belief that she was entitled to do so (see Penal Law § 155.15[1]; *People v Zona*, 14 NY3d 488, 493 [2010]), and that her actions caused her employer to become indebted to a rental company in an amount that exceeded \$7,000.

Defendant's challenges to the prosecutor's summation and the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

To the extent defendant is claiming that she received ineffective assistance of counsel, we reject that claim (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6459 Mary Astor, Index 117273/08  
Plaintiff-Appellant,

-against-

Young Men's and Young Women's  
Hebrew Association, etc., et al.,  
Defendants-Respondents.

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Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of  
counsel), and Keith DeVries, New York, for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky  
of counsel), for respondents.

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Order, Supreme Court, New York County (Marylin G. Diamond,  
J.), entered December 8, 2010, which granted defendants' motion  
for summary judgment dismissing the complaint, unanimously  
affirmed, without costs.

Plaintiff was injured when she tripped over the leg of a  
folding chair while participating in defendants' health and  
fitness class for seniors. She had attended the class many times  
before, was aware that there was a row of folding chairs along  
the back wall of the studio, and had seen the chairs on the day  
of her accident. Thus, she is deemed to have assumed the risk  
that resulted in her injury (see *Roberts v Boys & Girls Republic,  
Inc.*, 51 AD3d 246, *affd* 10 NY3d 889 [2008]; *Milliner v New York  
City Hous. Auth.*, 57 AD3d 383, 383-384 [2008]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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in the interest of justice. Under the terms of the DTAP agreement, defendant's inadequate compliance exposed him to an even longer sentence than the court actually imposed.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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written plea agreement. The court, however, did not reference the imposition of postrelease supervision (PRS) as a component of the alternate sentence. Under *People v Catu* (4 NY3d 242, 244-245 [2005]), PRS was a direct consequence of the plea notwithstanding that defendant could have earned a misdemeanor disposition had he complied with the agreement (see *People v McAlpin*, \_\_\_ NY3d \_\_\_, 2011 NY Slip Op 08456). Accordingly, he is entitled to vacatur of his plea as not knowing and voluntary. Moreover, defendant was not required to preserve the instant *Catu* claim because the court did not inform him of his exposure to PRS until sentence was imposed (see *id.*).

We find it unnecessary to reach any other issues.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
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business venture. Defendant moved into plaintiff's apartment, living rent-free, while they looked for investors. In February 2008, prior to receiving any investment money, defendant withdrew from the partnership.

Defendant could not unilaterally dissolve the partnership since the partnership had the specific undertaking of acquiring a business and expanding it until the investors would receive a return on their capital investments. Moreover, the partnership also had a definite term, namely, to achieve the liquidity event. "[W]here a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished" (*Hooker Chems. & Plastics Corp. v International Mins. & Chem. Corp.*, 90 AD2d 991, 991 [1982], quoting *Hardin v Robinson*, 178 App Div 724, 729 [1916], *affd* 233 NY 651 [1918]). Here, a sale or other liquidity event was the ultimate goal of the partnership, and until that time a partner could not unilaterally terminate the partnership.

Thus, it does not matter that the partnership was to operate between four to seven years to achieve the liquidity event, and it was error for the lower court to dismiss the breach of contract claim this early in the action. As the Court of Appeals has held, "In the absence of an express term fixing the duration

of a contract, the courts may inquire into the intent of the parties and supply the missing term if a duration may be fairly and reasonably fixed by the circumstances and the parties' intent" (*Haines v City of New York*, 41 NY2d 769, 772 [1977]; see also *Scholastic, Inc. v Harris*, 259 F 3d 73, 85 [2001] ["Whether a partnership is terminable at will is a question of fact, and the jury should determine what the parties intended if the agreement does not fix an express duration"]).

Here, neither party expressly held out that the partnership was to be one terminable at will. Nor was the venture to be perpetual in nature. That is, the partnership did not seek to achieve an indefinite number of "liquidity events," but rather to achieve the one discernable event to give a return to a limited number of investors (see *Better Living Now, Inc. v Image Too, Inc.*, 67 AD3d 940, 941 [2009] ["Unless a contract expressly provides for perpetual performance, the 'law will not imply that a contract calling for continuing performance is perpetual in duration]" quoting *Haines* at 772. In such a situation, and at this early juncture in the action, plaintiff's breach of contract claim should not have been dismissed.

Nor is the oral agreement between plaintiff and defendant barred by the statute of frauds. General Obligations Law § 5-701(a)(1) provides that "a. Every agreement . . . is void,

unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, . . . , if such agreement, . . . 1. By its terms is not to be performed within one year from the making thereof." In deciding if an oral agreement falls within the statute of frauds, it matters not that it was unlikely or improbable that the contract could be performed within a year; rather, "[t]he critical test . . . is whether 'by its terms' the agreement is not to be performed within a year" (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 265 [1977]; see also *Foster v Kovner*, 44 AD3d 23, 26 [2007] [stating that the statute of frauds "encompasses only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year" and that "(i)t matters not that completion of performance within one year may be unlikely or improbable"] [internal quotation marks and citations omitted]). Here, although the estimated time to achieve a liquidity event was to be four to seven years, it cannot be said that there was absolutely no possibility that performance could not be completed within one year, and since "neither party has contended that the alleged agreement contained any provision which directly or indirectly regulated the time for performance, the agreement is not within the bar of the [statute of frauds]" (*Freedman*, 43 NY2d at 265).

In any event, where, as here, there is partial performance of the partnership agreement, the statute of frauds is inapplicable (see *H.P.P. Ice Rink v New York Islanders*, 251 AD2d 249 [1998]). The partial performance here included naming the LLC after the respective school colors of plaintiff and defendant, plaintiff and defendant moving in together and listing their residential address as their business address, creating joint business cards, creating marketing material, and sending numerous e-mails to and attending meetings with potential investors.

All concur except Tom, J.P. and Catterson, J. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

In my opinion, because the plaintiff does not allege that the parties' oral partnership agreement had a definite term, it was an at-will partnership that the defendant had the right to terminate at any time. Therefore, I must respectfully dissent.

This action arises from a purported oral partnership agreement between the plaintiff and the defendant that was formed for the purpose of engaging in a business venture called a "search fund." The plaintiff alleges that the parties would solicit investment capital from investors, and then use the money to locate a business with growth potential, acquire the business, expand it, and create a "liquidity event," such as selling it for a profit, when the investors would receive their returns on their investments. The plaintiff further alleges that upon finding a target business, he and the defendant agreed to purchase it and "operate the business until the liquidity event could be achieved, or, if the liquidity event could not be achieved earlier, they would operate the business for a period of approximately 4 to 7 years." If a profitable liquidity event could not be achieved, then they would "sell the business," and if it could not be sold, they would attempt to "create some other liquidity event, such as an initial public offering." In February 2008, after having found potential investors, but before

receiving any investment money, the defendant withdrew from the partnership.

On August 11, 2009, the plaintiff filed an amended complaint asserting causes of action for breach of an oral partnership agreement and tortious interference with business relationships, and seeking \$700,000 in damages. The defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(7), and the motion court granted the motion on March 16, 2010. For the reasons, set forth below, I would affirm the motion court and dismiss the complaint.

I disagree with the majority that the oral partnership agreement was for a definite term or particular undertaking. As the motion court noted, correctly in my opinion, the parties discussed various plans and business scenarios. Citing to Sanley Co. v. Louis, 197 A.D.2d 412, 602 N.Y.S.2d 605 (1st Dept. 1993), the motion court found that the plaintiff failed to allege sufficient facts to support his contention that the partnership was for a definite term or a particular objective. In Sanley, this Court found that a partnership formed "for the purposes of acquiring, managing and reselling residential real estate," with "no term of duration . . . set by the partners" was a partnership at will. 197 A.D.2d at 413, 602 N.Y.S.2d at 605-606; see e.g. Harsman v. Pantaleoni, 294 A.D.2d 687, 741 N.Y.S.2d 348 (3d Dept. 2002) (where agreement provided that partnership would continue

until certain real property was sold, partnership had no definite term and was therefore at will).

Similarly, in this case, a partnership formed for the purpose of acquiring, improving and reselling a business with no specified term of duration is a partnership at will. Absent a "definite term," the purported partnership was at will and the defendant could dissolve it at any time. See Partnership Law § 62[1][b]; Shandell v. Katz, 95 A.D.2d 742, 743, 464 N.Y.S.2d 177, 179 (1983).

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5952            In re Ibn Abdus S.,  
  
                  A Person Alleged to  
                  be a Juvenile Delinquent,  
                  Appellant.  
                  - - - - -  
                  Presentment Agency

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Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about July 13, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of forcible touching and sexual abuse in the second degree, and conditionally discharged him for a period of 12 months, unanimously modified, on the law, to vacate the finding of sexual abuse in the second degree, and otherwise affirmed, without costs.

The court credited the testimony of the 11 year-old complainant<sup>1</sup> and found, based on her testimony, that on the morning of October 6, 2010 she was in the school gym with

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<sup>1</sup>The appellant did not testify on his behalf or call any witnesses.

approximately 100 other students, including 10 year-old appellant. At some point during gym class, the complainant was walking by herself towards the bleachers where the majority of her friends were sitting. It was at this point that appellant quickly approached her, and when he was face-to-face with her, used both of his hands to shove her with such force that she fell backwards onto the gym floor. Appellant's friend, just as quickly, restrained the complainant by holding her arms above her head while she was still on the gym floor. Appellant then stood over the complainant, and using both of his hands, grabbed, squeezed and twisted the complainant's breasts. Once appellant released the complainant, she chased after him, yelling that he should never have touched her. Appellant did not say anything to the complainant during the incident or the subsequent chase.

A person is guilty of sexual abuse in the second degree when he "subjects another person to sexual contact and when such other person is . . . less than fourteen years old" (Penal Law § 130.60[2]). Sexual contact is defined as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire" (Penal Law § 130.00[3]). The crime of forcible touching requires a finding that the individual "intentionally, and for no legitimate purpose, forcibly touche[d] the sexual or other intimate parts of another person for the

purpose of degrading or abusing such person . . . ” (Penal Law § 130.52). Forcible touching includes “squeezing, grabbing or pinching” (*id.*). The statutory language requiring the perpetrator to have the intent to degrade or abuse recognizes that not all crimes of a sexual nature are committed for the purpose of gratifying sexual desire (Attorney General’s Mem approving Senate Bill S8283, Aug. 2, 2000). Indeed, one of the stated purposes for creating the crime of forcible touching was to “close existing loopholes related to sex crime prosecution” (2000 NY Senate Bill S8238). Here, the court’s finding that appellant committed the offense of forcible touching was based on legally sufficient evidence. The complainant’s testimony established that there was no legitimate purpose for appellant to shove and touch her in this way. Appellant’s conduct was aggressive and intentional, and done at a point during gym class when the complainant was walking by herself. Contrary to appellant’s argument below, the parties were not engaged in a game at the time, nor had they participated in a game together at any point during gym class. Notably, the complainant testified that boys and girls were supposed to stay on opposite sides of the gym.

Appellant’s requisite mental state and purpose, which can be inferred from his conduct and the surrounding circumstances,

(*People v Bonsu*, 290 AD2d 251 [2002], *lv denied* 98 NY2d 636 [2002]; *Matter of Jonathan F.*, 290 AD2d 385 [2002]), was to degrade and abuse the complainant. Shortly before the incident, appellant had been rebuffed by the complainant in front of a group of sixth-grade girls. The complainant testified that while she and her friends were practicing cheerleading in the gym, appellant was hovering nearby. The complainant could not remember if one of her friends, or appellant, told her that appellant "liked" her. Either way, the complainant was clear in telling appellant to leave her alone and that she did not "like" him. The complainant also testified that she had never spoken to or seen appellant prior to that day in the gym class. Rather, she only had heard of appellant because his cousin was one of her classmates. It was only after being rebuffed by the complainant and embarrassed in front of his peers that appellant then sought out the complainant and pushed her to the ground into a submissive position in front of the other students.

Although a close question, we conclude there was insufficient evidence to prove that appellant committed the offense of sexual abuse in the second degree. While appellant's behavior is offensive, "the evidence was insufficient to establish beyond a reasonable doubt that he was acting for the purpose of obtaining 'sexual gratification' as required under the

Penal Law" (*Matter of Shamar D.*, 84 AD3d 605, 605 [2011]; see *Matter of Keenan O.*, 273 AD2d 167 [2000]; *Matter of Clifton B.*, 271 AD2d 285 [2000]). Indeed, although the conduct in *Matter of Clifton B.* was more graphic and unambiguous, this Court determined that it could not be readily inferred from the appellant's conduct that he acted for the purpose of gratifying a sexual desire. Here, we have far less graphic conduct and thus, the element of sexual gratification cannot be readily inferred from appellant's conduct or the surrounding circumstances.

This Court has sustained the count of sexual abuse in cases where there can be no explanation other than that the assailant was acting to obtain sexual gratification (*Matter of Najee A.*, 26 AD3d 258 [2006], *lv denied* 7 NY3d 703 [2006] [appellant restrained complainant and repeatedly rubbed his genitals against complainant's buttocks, while trying to remove complainant's pants]; *Matter of Joel H.*, 279 AD2d 266 [2001] [appellant, a teenager, and complainant were at a public swimming pool when appellant fondled complainant's breasts while appellant's accomplice rubbed his genitals against the complainant's buttocks]). However, in this case, in light of appellant's young

age and the absence of any other evidence showing that he was acting to gratify a sexual desire, the conviction for sexual abuse was legally insufficient.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5576-

Index 116707/06

5577 Deborah Ostrov,  
Plaintiff-Respondent,

-against-

Jacob Rozbruch, M.D.,  
Defendant-Appellant,

Beth Israel Medical Center,  
Defendant.

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 21, 2010, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint. Appeal from order, same court and Justice, entered on or about January 20, 2011, dismissed, without costs, as academic.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.  
John W. Sweeny, Jr.  
Karla Moskowitz  
Rosalyn H. Richter  
Nelson R. Roman, JJ.

5576-5577  
Index 116707/06

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Deborah Ostrov, x  
Plaintiff-Respondent,

-against-

Jacob Rozbruch, M.D.,  
Defendant-Appellant,  
  
Beth Israel Medical Center,  
Defendant.

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Defendant Jacob Rozbruch, M.D. appeals from the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 21, 2010, which, to the extent appealed from as limited by the briefs, held his motion for summary judgment in abeyance pending the submission of further specified papers, and from the order, same court and Justice, entered on or about January 20, 2011, which, to the extent appealed from, denied so much of his motion for summary judgment as sought dismissal of plaintiff's claim that the left knee replacement surgery was contraindicated.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner and Daryl Paxson of counsel), for appellant.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for respondent.

SWEENEY, J.

This medical malpractice action requires us to refine the scope of supplemental submissions on motions for summary judgment.

Plaintiff is an 80-year-old woman with a long history of orthopedic and vascular problems. She has been treated over the years by a number of physicians in various medical disciplines, including defendant, an orthopedic surgeon. Defendant Jacob Rozbruch, M.D. treated plaintiff for a variety of orthopedic conditions and performed a number of surgeries, including a 2001 elbow fracture repair, a 2001 total hip replacement, a 2003 total right knee replacement and a 2004 total left knee replacement, the latter being the subject of this litigation.

On November 14, 2001, at a follow-up visit concerning plaintiff's hip replacement surgery, defendant observed that plaintiff had limited range of motion in the lower extremities. X rays revealed end-stage osteoarthritis to the right knee, and defendant recommended bilateral knee replacement surgery. Plaintiff did not have surgery at that time but returned to defendant's office in September 2003, complaining of severe pain in her right knee. Defendant again recommended bilateral knee replacement surgery, and, on October 13, 2003, a right knee replacement was performed at Beth Israel Medical Center.

During postsurgical rehabilitation for the right knee replacement, it was noted that plaintiff suffered numbness of the left lower extremity, which condition had apparently commenced prior to the right knee surgery. Defendant performed some tests and, on November 11, 2004, recommended that plaintiff also undergo left knee replacement surgery. On March 12, 2004, defendant noted a plan to schedule the left knee replacement surgery for May, following preoperative clearance by plaintiff's internist and a consult by a foot specialist.

On June 7, 2004, defendant performed a total left knee replacement on plaintiff at Beth Israel. On June 11, a Beth Israel physical therapist observed swelling on plaintiff's left leg, which was similar to that observed after the surgery on her right knee. This swelling continued to increase and in December 2004 plaintiff's vascular surgeon, Dr. Haveson, noted that he was "mystified" by the swelling. Plaintiff thereafter was treated by a number of different medical providers for this condition throughout 2005 and into 2006. The reports of at least two of these providers attributed her condition to the left knee surgery.

Plaintiff commenced this medical malpractice action on or about November 7, 2006. In her bill of particulars, plaintiff alleged, inter alia, that defendant doctor was "careless,

unskillful and negligent in failing to pay sufficient heed to plaintiff's prior history . . . in failing to timely and properly assess the vascular status of the left lower extremity pre-operatively." Plaintiff also alleged that the surgery on her left knee was improperly performed.<sup>1</sup>

On August 17, 2009, defendant doctor timely moved for summary judgment, arguing that plaintiff was an appropriate candidate for surgery, that the surgery was properly performed, and that no interoperative vascular injury occurred. In support of his motion, defendant submitted the affidavits of six experts, four of whom were plaintiff's own treating physicians. In opposition, plaintiff argued that questions of fact existed concerning, inter alia, whether defendant departed from good and accepted medical practice in recommending and performing the left knee replacement, given the totality of plaintiff's prior medical history. In support, plaintiff submitted the affidavit of her expert orthopedic surgeon, name redacted, who opined that given plaintiff's longstanding diagnosis of chronic venous insufficiency, as well as specific problems concerning her left foot, toes and leg, the surgery was contraindicated.

In reply, defendant argued that plaintiff had not

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<sup>1</sup>Plaintiff also alleged lack of informed consent but that cause of action was subsequently withdrawn.

specifically pointed out how the surgery at issue was negligently performed. As to whether the surgery was contraindicated, defendant argued that plaintiff never properly pleaded such an allegation in either her complaint or bill of particulars and that plaintiff's orthopedic expert's opinions on this issue were unsupported and conclusory.

On July 7, 2010, the motion court heard oral argument on defendant's motion and on the hospital's motion for summary judgment. In an order dated July 12, 2010, the court granted summary judgment to defendant hospital, but held defendant doctor's motion in abeyance. The court concluded that defendant doctor made a prima facie showing that he had not departed from accepted medical/surgical care in his treatment of plaintiff, thus shifting the burden to plaintiff to demonstrate the existence of material issues of fact. The court went on to state that while plaintiff's expert had not taken issue with the manner in which the surgery was performed, he opined that defendant doctor had deviated from accepted medical care by performing the surgery in the first place, stating it was contraindicated by plaintiff's past history of vascular issues. Noting that defendant's position that he was "never explicitly on notice" of this new claim (i.e., that the surgery was contraindicated) had "some merit," the court nevertheless was

troubled by the "limited discussion by the plaintiff's expert as to why this precise surgical procedure, the total left knee replacement, was contraindicated in light of plaintiff's history and clinical picture and also as to the mechanism of the injury." The court found plaintiff's expert's affirmation did not provide specifics as to why the surgery was contraindicated or how the surgery caused the specific postsurgical deterioration. Observing that it "could be argued" that this lack of evidence warranted granting of defendant's motion, the court nevertheless decided that the "better practice" would be to direct both sides to submit additional evidence.

Pursuant to the court's direction, plaintiff submitted an expert affirmation from a vascular surgeon, who opined in essence that, due to plaintiff's chronic venous disorders, knee replacement surgery would exacerbate her condition and thus the surgery was contraindicated. Defendant submitted three additional expert affirmations from three additional expert physicians, as well as supplemental affirmations from three previously named experts, which in essence contradicted plaintiff's new expert and clarified previously submitted affirmations. Of note is the fact that plaintiff's additional expert was from a different medical discipline (vascular surgery) and did not submit an affirmation in the original opposition

papers. Similarly, although defendant did submit supplemental affirmations from three of his experts who had provided affirmations on the original motion, he too submitted affirmations from three experts who had not previously provided affirmations.

The motion court again heard oral argument, at which time plaintiff's counsel, by way of rebuttal, handed up to the court a medical article authored by three of defendant's additional experts in an attempt to impeach their opinions. Significantly, defendant's counsel was not provided with this article before oral argument and it was not cited by any expert for either party. Plaintiff's counsel also advised the court that plaintiff's right leg had been amputated.

In a decision dated January 14, 2011, the court noted that plaintiff's three right knee "subsequent surgeries appeared to be a powerful argument in favor of the disputed June 2004 left knee surgery despite the plaintiff's circulatory problems," especially since they were performed by doctors other than defendant. However, the court stated that this argument "loses its appeal" because, as counsel noted at oral argument, plaintiff's right leg was subsequently amputated. Significantly, the record before us is devoid of any evidence concerning plaintiff's right leg amputation. There is also no indication regarding the reason for

such amputation. Most importantly, the relevance of the alleged right leg amputation to the claims of malpractice regarding plaintiff's left knee surgery were not discussed in the decision and are not part of the record before us. The court ultimately granted defendant's motion for summary judgment dismissing all causes of action except for the claim that the June 2004 "total left knee replacement was contraindicated in light of what was known and could have been reasonably anticipated regarding plaintiff's venous disorder." Defendant appeals.

We start with an examination of the basic purpose of summary judgment.

Calling summary judgment "a valuable, practical tool for resolving cases that involve only questions of law," the Court of Appeals stated it was "a great benefit both to the parties and to the overburdened New York State trial courts" by allowing a party to show that there is no material issue of fact to be tried, "thereby avoiding needless litigation cost and delay" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). As the Court recognized in *Brill*, these benefits can only be realized when motions for summary judgment are timely brought. The Legislature agreed, and in a 1996 amendment to CPLR 3212(a), provided that such motions be brought within 120 days after the filing of the note of issue, except for good cause shown. The goal, of course,

is to provide a thorough presentation of the evidence on both sides and an expeditious determination by the court as to whether there are any material issues of fact to be tried.

Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, the motion court specifically found that defendant met his burden of establishing that he was entitled to judgment as a matter of law, thus shifting the burden to plaintiff to properly establish the existence of a material issue of fact. The court recognized that plaintiff's initial opposition papers did not meet that burden because of the "limited" discussion regarding whether the surgery on plaintiff's left knee was contraindicated. Although recognizing that this claim was possibly being raised for the first time in opposition to defendant's motion, the

court, apparently relying on some of our prior decisions permitting additional submissions under limited circumstances, opted to permit the parties to submit additional evidence on this issue. The resulting submissions went well beyond the limitations our prior decisions envisioned.

It appears that our holdings in *Orsini v Postel* (267 AD2d 18 [1999]), *Ashton v D.O.C.S. Continuum Med. Group*, (68 AD3d 613 [2009]) and *Tierney v Girardi* (86 AD3d 447 [2011]) may have created the erroneous impression that supplemental submissions could be routinely utilized in summary judgment motions without regard to the scope of such submissions or the time limitations imposed by the CPLR. While such supplemental submissions may be appropriate in particular cases, they should be sparingly used and then only for a limited purpose. A careful reading of these cases warrants this conclusion.

In *Orsini*, which was decided before *Brill*, we found that the court properly exercised its discretion in accepting a supplemental physician's affirmation submitted by the plaintiff without leave of court in response to the defendant's reply papers. There, the affirmation "was submitted well in advance of argument, the IAS court expressly offered defendant an opportunity to respond, and it does not otherwise appear that defendant was prejudiced by the IAS court's preference to decide

this eve-of-trial motion on as full a record as plaintiff wished to make" (267 AD2d at 18). Significantly, *Orsini* presented the type of "eve-of-trial" motion that *Brill* expressly condemned.

In *Ashton*, the court directed the plaintiff's expert to submit a supplemental affirmation elaborating solely on his initial conclusions. The defendants were also given a final opportunity to respond. We held that "the court properly exercised its discretion in directing plaintiff to submit a supplemental expert affirmation stating the basis for the expert's opinion, where defendants were permitted to respond and were not otherwise prejudiced." (68 AD3d at 614). Of note is the fact that, unlike here, the supplemental affirmation in *Ashton* was from the *same* expert, not a different expert in a different medical discipline, and was limited to a discrete issue, i.e., clarification of the grounds for the plaintiff's expert's initial conclusion.

*Tierney* presented a different situation. There, the defendants demonstrated their entitlement to judgment dismissing the complaint as a matter of law, shifting the burden to the plaintiff. The court properly exercised its discretion in excusing plaintiff's procedural oversights, "including the untimely filing of her expert's affirmation, where there was no showing that plaintiff acted in bad faith or that the late filing

prejudiced defendants, and where the court permitted defendants to respond to the supplementary affidavit" (86 AD3d at 448). Once again, *Tierney* was not a situation where the plaintiff's opposition papers were insufficient and the parties were permitted to submit additional papers.

The supplemental submissions in all three cases were limited in scope and temporal duration. Indeed, there is no indication that the supplemental submissions included material from additional experts in other medical disciplines or information not originally referenced in plaintiff's initial opposition papers.

The situation before us in this case is very different. As noted, both parties submitted supplemental expert affirmations from experts in different medical disciplines. Moreover, these affirmations expanded the scope of plaintiff's theory of medical malpractice beyond what was encompassed in the complaint and bill of particulars. Indeed, plaintiff's theory, as originally set forth in the complaint, alleged, *inter alia*, that the surgery was improperly performed. Her bill of particulars and supplementary bill of particulars only made oblique references to the failure to discuss alternatives to surgery and then only in the bill of particulars in response to defendant hospital's demands, not those of defendant doctor. "A court should not consider the

merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796 [2011]; see also *Abalola v Flower Hosp.*, 44 AD3d 522 [2007]).

Since the court found plaintiff's opposition papers insufficient save for this new theory of recovery, defendant's motion should have been granted.

The problems created by open-ended supplemental submissions are manifest. A procedure designed to expeditiously determine a case took over 17 months from the time of the original filing of defendant's motion for summary judgment to the final order of the court. What started out as a limited inquiry into the basis of plaintiff's expert's conclusion that the surgery in question was contraindicated took on a life of its own, with the parties submitting affirmations from additional experts in a variety of medical disciplines. The improper submission of the medical article during the second oral argument caught defendant unawares. Importantly, none of the experts referenced this article in arriving at their opinions. Nevertheless, the court, over defendant's objections, received this article and utilized it as part of the basis for finding that plaintiff had raised a material issue of fact warranting a trial.

As the Court of Appeals stated in a different context,

"[O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010], citing *Brill v City of New York*, 2 NY3d 648 [2007], *supra*). We have held that "motion practice in connection with summary judgment should be confined to the limits imposed by CPLR 2214(b)" (*Henry v Peguero*, 72 AD3d 600, 602 [2010], *appeal dismissed* 15 NY3d 820 [2010]). We do not mean to limit the necessary discretion inherent in a court's authority to direct supplemental affirmations, in appropriate circumstances, such as those presented in *Ashton* or *Tierney*. Supplemental affirmations however, should be sparingly used to clarify limited issues, and should not be utilized as a matter of course to correct deficiencies in a party's moving or answering papers.

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 21, 2010, which, to the extent appealed from as limited by the briefs, held defendant doctor's motion for summary judgment in abeyance pending the submission of further specified papers, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint. The appeal from the order, same court and Justice, entered on or about January 20, 2011, which, to the extent appealed from, denied so

much of defendant's motion for summary judgment as sought dismissal of plaintiff's claim that the left knee replacement surgery was contraindicated, should be dismissed, without costs, as academic.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 3, 2012

  
CLERK